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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER OLIVA GUERRERO,

Defendant and Appellant.

C058441

(Super. Ct. No. CRF045426)

A jury found defendant Javier Oliva Guerrero guilty of involuntary manslaughter (as a lesser offense of the charge of murder) and assault on a child under eight with force likely to produce great bodily injury that resulted in death (hereafter child abuse homicide). (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 731). The trial court sentenced him to state prison, staying sentence on the conviction for involuntary manslaughter pursuant to Penal Code section 654.

The defendant asserts that the evidence failed to show that he had any subjective awareness of circumstance that would lead

a reasonable person to realize that the nature of his actions would inflict great bodily injury. The defendant argues the evidence is consequently insufficient to sustain his assault conviction. We shall affirm.

#### **FACTS**

As the defendant recognizes, under the established standard of review we resolve all evidentiary conflicts, credibility disputes, and reasonable inferences in favor of the judgment and then determine whether the verdicts are reasonable in light of the record as a whole (*People v. Johnson* (1980) 26 Cal.3d 557, 577-578; *People v. Mack* (1992) 11 Cal.App.4th 1466, 1468; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633). He therefore properly disregards his efforts to disavow any criminal liability for the injuries to the child, Z.M.

The defendant and Z.M.'s mother had been coworkers, who moved in together about eight months before August 2004. Living with them in the apartment were the mother's six-year-old daughter, A.M. and the victim, Z.M., her 30-month-old son. In July 2004, the defendant had hit mother, who was pregnant, in the face in the middle of an argument. He lost his job as a result of his arrest, so he had been watching the children during the day when their mother was at work. He found occasional work as a mechanic at his father's home, where he would bring the children along.

On two occasions, the defendant had slapped Z.M. on his buttocks to discipline him because he was angry at the child for

being "rather naughty"; this left an imprint of his hand. The mother argued with the defendant about this, telling him not to do it again because they were not his children. The defendant agreed not to hit them again. She had never seen him otherwise strike either child.

About a week before his death, Z.M. had a cut on his head. The defendant told the mother (who had not been present) that he had been inside making lunch at the time when Z.M. had fallen off his bicycle.<sup>1</sup> The doctor closed the small wound with staples.

Z.M. was "quite thin," for which reason his mother had taken him to see a doctor. He had also been complaining of stomach pains, for which she had made a medical appointment.

The daughter, A.M. did not remember ever seeing the defendant hit her brother. She did not testify that the defendant ever hit her, or about any fear of the defendant. The mother claimed that both children loved the defendant like a father.

On August 16, 2004, the defendant brought Z.M. along as he dropped off the daughter at school and the mother at work. About an hour later, he went to an auto parts store; in the midst of his transaction, he went outside, then came back in and said there was a problem with his child and he had to leave. Defendant drove to a nearby medical clinic and saw a fire truck

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<sup>1</sup> He gave the same explanation in his initial statement to the police, and at trial.

in the parking lot. Defendant took Z.M. out of the car and gave him to the firefighters. The firefighters began administering CPR. An ambulance took Z.M. almost immediately to the UC Davis Medical Center, where he died shortly afterward. On learning of his death, the defendant became visibly distraught, crying and punching the wall and seeming to berate the mother. When the mother asked him if he had hurt Z.M., the defendant told her that if he had done anything, he would pay for it. He returned to the auto parts store that afternoon to buy the item he had requested that morning. He cried as he told the clerk that his child had died.

In a second interview with a detective, the defendant was making eye contact as he described that morning's routine, but when he reached the point where he had dropped off the mother, he began to look away and fidget. The defendant told him that when they arrived home, he "tap[ped]" Z.M. on the stomach to get him to undo his car restraints and come into the house. Inside, Z.M. complained of a stomach ache, so the defendant tapped him on the stomach again and gave him mineral pills of some sort. They later drove to the auto parts store. Z.M. having fallen asleep, the defendant tapped him on the leg to wake him up, but Z.M. insisted on staying in the car. When the defendant came back outside, he found that Z.M. was slack and nonresponsive, and he sought assistance.

The defendant admitted he had also rubbed Z.M.'s stomach a few days earlier when he said he had a stomach ache. The detective asked the defendant to rub his arm to demonstrate the

force with which the defendant had attended to the stomach ache. The detective found the procedure painful, and it left red marks. The defendant acknowledged that Z.M. screamed during the massage and tried to get away from him.<sup>2</sup>

On further questioning, the defendant told the detective about also giving Z.M. a "love tap" at the apartment that morning on the stomach.<sup>3</sup> When the defendant demonstrated this on the 300-pound detective's leg, it moved the detective a couple of inches back in his chair.

The pathologist testified that the cause of death was blunt force trauma to the abdomen. There were crush injuries to the organs, including the pancreas, which was split in half, which left the organs hemorrhaging about a pint of blood into the abdominal cavity. The child could have lived as long as four hours after the blow. There were also indications of an earlier injury from at least 12 hours before that had been healing.

Z.M.'s abdomen had two small bruises. There were numerous fresh bruises all over his head and the rest of his body. The pathologist did not find any broken bones.

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<sup>2</sup> The defendant also testified about this stomach massage and Z.M.'s adverse reaction to it.

<sup>3</sup> At trial, he admitted striking Z.M.'s *shoulder* to hurry the child along so that they could go to the store. He claimed the transcript of the interview was inaccurate. He claimed that the detective had also attested to giving his own children love taps, and asserted "that's what we Mexicans do, that's how we do it."

## DISCUSSION

Defendant's argument centers around the element in child abuse homicide requiring, "force that to a reasonable person would be likely to produce great bodily injury." (Pen. Code, § 273ab.)

In *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*), the Supreme Court overruled two of its early decisions sub silentio that had construed the mental state for assault as requiring an intent to *commit an injury*, which the 1872 codification of the definition of assault had cited. (*People v. Wright* (2002) 100 Cal.App.4th 703, 714-716.) It substituted a mental state akin to negligence. (*Id.* at pp. 706, 711-712.) A defendant does not need to have "a specific intent to cause injury or a *subjective awareness of the risk that an injury might occur*." Rather, assault [requires only] an intentional act and *actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in application of physical force against another.*" (*Williams, supra*, at p. 790, italics added.)

In accord with this principle, the pattern instruction for a fatal assault of a child (employed in the present case) provides, "When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in great bodily injury to the child." In essence, the claim of the defendant is that the evidence we recited above does not show that he was aware of the fact of the nature of his act of striking the child with

respect to the *amount of force* he employed. The defendant admits that he derives his analysis from an unpublished case presently on review before the Supreme Court that reversed a conviction for child abuse homicide on this basis. (*People v. Wyatt* (Jan. 31, 2008, A114612), review granted May 14, 2008, S161545.) He suggests that his willingness to repeat his massage technique and the strength of his tapping for the detective shows his lack of awareness that they were excessive.

This argument simply restates that which *Williams* has declared irrelevant: a subjective awareness of the *risk of injury*. Clearly, the defendant was guilty of assault under *Williams*. He committed an act that would probably and directly result in the application of force to the victim. We disagree that "[s]ince the objective standard [of the *degree of injury*] here is higher, logic dictates that the subjective awareness standard must also be higher." The principle that subjective awareness of the risk of injury is irrelevant does not change merely because child abuse homicide requires infliction of a greater amount of force resulting in death. It is simply an assault with a more egregious injury than the mere battery of which a defendant does not need to be subjectively aware under *Williams*. As a result, the amount of force is not among the circumstances relating to the nature of his action of which a defendant must actually be aware at the time he undertakes the act of striking a child. Since we disagree with the legal basis for the defendant's claim of insufficient evidence, we necessarily reject his evaluation of the insufficiency of proof

of his awareness of his own strength as well. The nature of the injuries to the child shows that significant force was used. This is sufficient to establish that, when defendant acted, "he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in great bodily injury to the child." (CALCRIM No. 820.) The evidence here was more than adequate to sustain the conviction for child abuse homicide.

**DISPOSITION**

The judgment is affirmed.

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CANTIL-SAKAUYE, J.

We concur:

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SIMS, Acting P. J.

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RAYE, J.